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# The Removal of a Wife's Disabilities of Coverture

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analogous, except for the involuntary feature which is present here, to voluntary petition of community property, sanctioned by recent constitutional amendment<sup>38</sup> and statute<sup>39</sup>

This comment does not pretend to be an arbitrary summation of Texas law on this highly complicated problem. It must be said that the law is not altogether settled in several of these situations. Rather it is the author's intent to furnish such material as is currently available on the subject, with such conclusions as may reasonably be reached, and to provide food for thought as to whether the liabilities of the respective classes of property, which now rest on a baffling maze of implications and some ambiguities, should not be more clearly defined by the Legislature. Some slight consideration might even be given to the perhaps iconoclastic suggestion that the plan of resting liability almost entirely on implications from express provisions about exemptions, might be abandoned in favor of rewriting these statutes in direct, affirmative language dealing comprehensively with all the situations. It would probably not be too difficult to avoid the hazard of jeopardizing the sound progress which the courts have made.

*Shannon Jones.*

## THE REMOVAL OF A WIFE'S DISABILITIES OF COVERTURE

THE wife at common law had no capacity to contract.<sup>1</sup> This is true also in Texas except where this general disability of coverture has been relaxed by statutory provisions.<sup>2</sup> "The Legislature, not being restricted by the constitution, has the inherent right to change the rule of the common law and enlarge the priv-

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<sup>38</sup> TEX. CONST., art. XVI, § 15, as amended Nov. 2, 1948.

<sup>39</sup> TEX. CIV. STAT., art. 4624a, effective May 21, 1949.

<sup>1</sup> *Wadkins v. Watson*, 86 Tex. 194, 24 S. W. 385 (1893); 1 JONES' BLACKSTONE \*442 (1916).

<sup>2</sup> *Tolbert v. Standard Accident Ins. Co.*, \_\_\_ Tex. \_\_\_, 223 S. W. (2d) 617 (1949); *Lee v. Hall Music Co.*, 119 Tex. 547, 35 S. W. (2d) 685 (1931).

ileges and responsibilities of a married woman.”<sup>3</sup> There is no statutory provision for the complete removal of the wife’s disabilities. Those contracts made by a wife which at common law would be void are in Texas, however, merely voidable at the option of the wife.<sup>4</sup> There are certain contracts and conveyances made by the wife which the Texas statutes have made binding on her. She may be bound on contracts for necessities for herself and children<sup>5</sup> when they are reasonable and proper.<sup>6</sup> She may make binding contracts incident to her right of control and management of her separate estate<sup>7</sup> and incident to her control over certain portions of the community estate.<sup>8</sup> She must be joined by her husband in order to be bound as a surety or as a joint maker of a note.<sup>9</sup> If in case her husband should become insane or abandon her, the wife is granted certain emergency powers to convey and, in these or in similar extraordinary situations where the husband is not present and performing his duties as head of the family, she is impliedly given certain supplemental contractual powers.<sup>10</sup>

Another instance, in addition to the above, when a wife’s obligations are made binding on her is provided for in Article 4626<sup>11</sup> as follows:

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<sup>3</sup> *Martin v. Hays*, 36 S. W. (2d) 796 (Tex. Civ. App. 1931) *writ of error refused*; *George v. Dupignac*, 273 S. W. 934 at 936 (Tex. Civ. App. 1925) *writ of error refused*.

<sup>4</sup> *Leake v. Saunders*, 126 Tex. 69, 84 S. W. (2d) 993 (1935).

<sup>5</sup> TEX. REV. CIV. STAT. (Vernon 1948) art. 4621, *Lee v. Hall Music Co.*, 119 Tex. 547, 35 S. W. (2d) 685 (1931).

<sup>6</sup> TEX. REV. CIV. STAT. (Vernon 1948) art. 4624, *Fairbanks v. Dennett Motor Sales Co.*, 56 S. W. (2d) 474 (Tex. Civ. App. 1933); see *Levin v. Jeffers*, 122 Tex. 83, 89, 52 S. W. (2d) 81, 84 (1932).

<sup>7</sup> TEX. REV. CIV. STAT. (Vernon 1948) art. 4614, *Whitney Hardware Co. v. McMahan*, 111 Tex. 242, 231 S. W. 694 (1921).

<sup>8</sup> TEX. REV. CIV. STAT. (Vernon 1948) art. 4614, *Hawkins v. Britton State Bank*, 122 Tex. 69, 52 S. W. (2d) 243 (1932); *Cauble v. Beaver-Electra Refining Co.*, 115 Tex. 1, 274 S. W. 120 (1925).

<sup>9</sup> TEX. REV. CIV. STAT. (Vernon 1948) art. 4623, *Lee v. Hall Music Co.*, 119 Tex. 547, 35 S. W. (2d) 685 (1931).

<sup>10</sup> 23 TEX. JUR. 234-236 (1933).

<sup>11</sup> TEX. REV. CIV. STAT. (Vernon 1948) art. 4626. Originally enacted as Acts 1911, 32 Leg. ch. 52, p. 92 §§ 1 to 4, arts. 4629a to 4629d.

"Application to be feme sole—Any married woman, with the consent and joined by her husband, may apply by written petition addressed to the district court of the county in which she may desire to transact business for judgment or orders of the said court removing her disabilities of coverture and declaring her feme sole for mercantile and trading purposes; such petition shall set out the causes which make it to the advantage of said married woman to be so declared feme sole, and shall be filed and docketed as in other cases, and at any time thereafter the district court may, in term time, take up and hear said petition and evidence in regard thereto. If upon a hearing of said petition and evidence relating thereto, it appears to the court that it would be to the advantage of the woman applying, then said court shall enter its decree declaring said married woman feme sole for mercantile or trading purposes, and thereafter she may, in her own name, contract and be contracted with, sue and be sued, and all of her separate property not exempt from execution under the laws of Texas shall thereafter be subject to her debts and liable under execution therefor, and her contracts and obligations shall be binding on her."

It should be noted that the statute provides for a special and *ex parte* proceeding with the district judge acting as a commissioner. Inasmuch as it is an *ex parte* proceeding, the judge cannot be compelled to exercise this function, it not being one of his official duties, but merely an act of comity to the Legislature. All of the requirements of the statute must be strictly complied with, because no presumptions are to be indulged in favor of the regularity of the order in question.<sup>12</sup> This places the burden of proof as to compliance with the statute on the party asserting a right thereunder. The petitioner alone is affected and has no adversary.

In order to comply with the statute, the wife must file a written petition addressed to the district court of the county in which she may desire to transact business.<sup>13</sup> The legislature, in designating the court which may grant a remedy for this newly created right, has made venue jurisdictional and therefore, only the court speci-

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<sup>12</sup> Johnson v. Williams, 24 S. W. (2d) 79 (Tex. Civ. App. 1930) *writ of error refused*.

<sup>13</sup> Acts 1937, 45 Leg. ch. 499, p. 1343 § 2, an amendatory act, substituted the district court of the county in which she may desire to transact business for the district court of the county in which she may be a bona fide resident.

fied in the statute will have potential jurisdiction in such a case. The proceeding may be transferred to another district court within the same county by a proper entry of the order in the minutes of the court making the transfer.<sup>14</sup> No citation is issued. There is no provision for notice or summons to anyone. The required joinder of the husband in the petition and his signing of it are sufficient to show his consent.<sup>15</sup> The petition must set out the reasons why it will be to the advantage of the wife to be declared a feme sole for mercantile and trading purposes and a prayer for such a declaration. The petition must be filed and docketed as in other cases. Thereafter, in term time, the district court may take up and hear the petition and the evidence to support it and enter or deny its decree. There is no right of appeal provided from the judgment of the district court, and the granting of the order is entirely discretionary with the judge as a trier of fact. This explains the paucity of cases; questions on this topic reach the appellate courts only collaterally.

The statute does not expressly limit the wife's enlarged contractual rights to mercantile and trading purposes. A study of the statute as a whole certainly conveys the idea that the legislature intended such a limitation. Speer, in his *Law of Marital Rights in Texas*,<sup>16</sup> says that the necessary interpretation of the statute demands the limitation because, "If the purpose had been a general emancipation, it could have been easily so expressed." We are faced, however, with a square holding *contra* in *George v. Dupignac*<sup>17</sup> which cited *Red River Nat. Bank v. Ferguson*<sup>18</sup> and *Gooding v. Dove*<sup>19</sup> as authority and expressly held:

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<sup>14</sup> *Johnson v. Williams*, 24 S. W. (2d) 79 (Tex. Civ. App. 1930) *writ of error refused*.

<sup>15</sup> See *Dickinson v. Griffith Lumber Co.*, 213 S. W. 341, 343 (Tex. Civ. App. 1919).

<sup>16</sup> SPEER, *LAW OF MARITAL RIGHTS IN TEXAS*, 362 (3d Ed. 1929).

<sup>17</sup> *George v. Dupignac*, 273 S. W. 934 (Tex. Civ. App. 1925) *writ of error refused*.

<sup>18</sup> *Red River Nat. Bank v. Ferguson*, 192 S. W. 1088 at 1091 (Tex. Civ. App. 1917), *affirmed*, 109 Tex. 287, 206 S. W. 923 (1919), held, "the act of 1911 (... arts. 4629a to 4629d) enacted after the codification of that year as a separate statute provided for the removal of the disabilities of coverture, for certain purposes, and conferred upon married women whose disabilities had been removed the rights of a feme sole. As such she might make any character of contracts binding herself personally, except those

"By virtue of article 4629d, . . . , if a married woman, . . . , does have her disabilities removed, she has the right to make any kind of a contract, and she will be bound on any contract that she may thereafter make, the same as though she were a feme sole."<sup>20</sup>

In the revision of the statutes in 1925, the latter portion of Article 4629d was omitted when it was incorporated into the present Article 4626<sup>21</sup>. The omission does not seem to be material, but merely a striking of superfluous wordage, and Speer's argument might well be applied here, *i.e.*, had the legislature intended to effect a different result than that reached in *George v. Dupignac*, ". . . , it could have been easily so expressed."<sup>22</sup> Also, Speer's contention that ". . . in view of the decision followed by the change in the statute, the interpretation here suggested is inevitable,"<sup>23</sup> appears groundless in that the revision was adopted by the legislature approximately a month before the decision was rendered.<sup>24</sup> *George v. Dupignac* has been the only direct holding on the point and there have been no cases reported involving the 1925 revision. Since the court in that case was so definite in its interpretation of the statute as it then read, if the revision did not in fact change the substance of the statute, it is reasonable to assume that the holding will be followed.<sup>25</sup>

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conveying property. Here was a right to contract upon which the limitation in the proviso in article 4624 could operate. A married woman now emancipated from the disabilities of coverture by complying with the provisions of the act of 1911 would unquestionably be subject to that restriction, and cannot now claim the right to make the joint contracts referred to in article 4624 without the joinder of her husband."

<sup>19</sup> *Gooding v. Dove*, 262 S. W. 506 (Tex. Civ. App. 1924), held that, "under . . . arts. 4621, 4622, and 4624 and in view of articles 4629a to 4629d, removing certain disabilities of coverture, a wife cannot be held either as surety or as joint maker with, her husband on his note."

<sup>20</sup> *George v. Dupignac*, note 17, *supra*, at 936.

<sup>21</sup> The latter italicized portion of art. 4629d, *infra*, was omitted in the revision of 1925 when arts. 4629a to 4629d became art. 4626: ". . . and obligations shall be binding on her as if she were a feme sole. Provided, however, that no married woman shall convey or encumber her real property except as now provided by law."

<sup>22</sup> See note 16, *supra*.

<sup>23</sup> *Ibid.*

<sup>24</sup> Senate Bill 84, 39th Leg., Reg. Sess., 1925, TEXAS SENATE JOURNAL 1190. The bill was enrolled and sent to the Governor on March 19, 1925, and the decision in *George v. Dupignac* was rendered April 23, 1925.

<sup>25</sup> But see *Harris v. Prince*, 132 Tex. 231, 236, 121 S. W. (2d) 983, 985 (1938).

The legislative intent in passing such a statute undoubtedly was to lift the handicap of coverture, to an extent, from the woman engaged in the "business world" and to put her on a par with competing males and feme soles. Should the courts adopt the liberal interpretation discussed *supra*, it seems only reasonable that they should consider that the benefits are bestowed on women engaged in the professions as well. On the other hand, nowhere does the statute mention the professional woman, and such statutes as this, granting heretofore denied rights, should be strictly construed. The question has not been decided.

It is believed that enough district judges have been interviewed to justify the conclusion that district judges, on the whole, seem to favor a liberal interpretation of the statute as to the questions discussed in the two preceding paragraphs. They consider that it is necessary to construe this old statute broadly today in order to achieve the legislative purpose. The liberal view expressed by the court in *George v. Dupignac* is assumed by most district judges. It appears also that they will grant a decree for the removal of disabilities whenever it is believed to be necessary and advantageous to the woman applying; the words "mercantile and trading" are not considered as being restrictive.

In view of the decisions construing the effect of the provisions of what are now Articles 4614 and 4623 on what was Article 4629d prior to the 1925 revision,<sup>26</sup> the limitation as to the wife's power to convey realty, stocks, and bonds and the prohibition that she cannot be surety for her husband are apparently still restrictions on the wife's contractual powers under Article 4626.

The result of failing to comply with the statute in an attempt to have her disabilities removed is to place the wife in exactly the same position she occupied prior to the attempt.<sup>27</sup> The husband will not be bound although acting as his wife's agent, even if she is not bound because of non-compliance with the statute.<sup>28</sup> How-

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<sup>26</sup> See notes 18 and 19, *supra*.

<sup>27</sup> *J. B. Hershfeld & Co., Inc. v. Evans*, 127 Tex. 254, 93 S. W. (2d) 148 (1936).

<sup>28</sup> *Stevens v. Lilley*, 7 S. W. (2d) 883 (Tex. Civ. App. 1928).

ever, if in the mistaken belief that she had been validly declared a feme sole for mercantile and trading purposes, she induces one to rely on her as such by positive representations to that effect, she may be estopped from asserting her disabilities of coverture to avoid her obligation. In that situation, although not guilty of active fraud, she would be guilty of legal fraud.<sup>29</sup>

The question of whether the order removing the wife's disabilities under this statute is revocable or not has never been decided, nor has it arisen in the analogous situation where a minor's disabilities are removed. The statutes make no provision for revoking. It would seem that the district judge, acting as a commissioner, has the inherent power to set aside the order on proper petition and evidence by the wife. However, if the wife were able to remove her disabilities and then revoke, it is apparent that the likelihood of fraud by the wife on creditors, even with estoppel, would be greatly increased.

The advantages to the wife of complying with this statute are numerous. She may now "in her own name, contract and be contracted with, sue and be sued, and all her property not exempt from execution under the laws of Texas shall . . . be subject to her debts and liable under execution therefor, and her contracts and obligations shall be binding on her."<sup>30</sup> Many of the wife's mercantile and trading obligations would be voidable, but having complied with this statute they will now be valid and enforceable against her.<sup>31</sup> Knowing this to be true, business men and prospective creditors will be considerably less hesitant to enter into contracts with this wife. As a matter of law in Texas, a married woman cannot be a member of a partnership unless her disabilities of coverture are removed.<sup>32</sup> By compliance with the statute, she may now enter into a business partnership.

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<sup>29</sup> *Barnes v. Archer*, 77 S. W. (2d) 883 (Tex. Civ. App. 1934).

<sup>30</sup> See note 11, *supra*.

<sup>31</sup> *J. B. Hershfeld & Co., Inc. v. Evans*, 127 Tex. 254, 93 S. W. (2d) 148 (1936).

<sup>32</sup> *Kosch v. Commissioner of Internal Revenue*, 63 F. (2d) 466 (C.C.A. 5th 1933); *Dillard v. Smith*, Chief Justice, 146 Tex. 227, 205 S. W. (2d) 366 (1947); *Purdon v. Boyd*, 82 Tex. 130, 17 S. W. 606 (1891); *Miller v. Marx & Kempner*, 65 Tex. 131 (1885).



In view of Article 4623 it might be assumed that both the wife's separate property and also special portions of the community property would be liable for the emancipated wife's mercantile or trading contracts, but the clear-cut language of Article 4626 and also Article 4621 preclude the contention that any but the wife's separate property becomes liable. Of course, neither the husband's separate property nor the ordinary community property would be liable for a wife's business obligations where the husband did not join in the obligations. It would seem, where the contract is one which the wife could ordinarily make and is not connected with her business, that in addition to her separate property, the special community property will be bound.<sup>33</sup>

The married woman's greatest handicap in the business world is still with her. The Constitution<sup>34</sup> in defining what a wife's separate property shall be has the effect of making all profits from any enterprise in which she may engage community property.<sup>35</sup> This results in making her a partner with the community estate in her business if she reinvests the profits.

There is always present the strong presumption that all property of a husband or wife is community property unless it can be clearly shown to be otherwise.<sup>36</sup> This will necessitate careful tracing of the original investment made by the wife, for if it is commingled with the community profits and cannot be traced with some certainty, the whole business enterprise could be subjected to the debts of the husband and in the case of insolvency of her business, the wife would be nothing more than a creditor of the community estate.<sup>37</sup>

Where the wife has complied with Article 4626 and borrows

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<sup>33</sup> *Graves v. Parker*, 22 S. W. (2d) 747 (Tex. Civ. App. 1930) *writ of error dismissed*.

<sup>34</sup> TEX. CONST. Art. XVI, § 15.

<sup>35</sup> *Purdon v. Boyd*, 82 Tex. 130, 17 S. W. 606 (1891); *Smith v. Bailey*, 66 Tex. 553, 1 S. W. 627 (1886); *A. B. Richards Medicine Co., Inc. v. Jennings*, 283 S. W. 296 (Tex. Civ. App. 1926) *writ of error dismissed*; *Schwethelm v. Schwethelm*, 1 S. W. (2d) 911 (Tex. Civ. App. 1927).

<sup>36</sup> Cases cited note 35, *supra*.

<sup>37</sup> *Smith v. Bailey*, 66 Tex. 553, 1 S. W. 627 (1886).

money for her business or buys on credit for her business and it is not contemplated that the debt be paid out of profits, it would certainly seem here that the wife should clearly be entitled to the money borrowed or the property purchased as her separate property. Of course, if it was the intention of all concerned that the debt be paid from profits, a community debt would be created and the property received would be community property.<sup>38</sup>

In case the tangible property of the wife's business is damaged, any reimbursement will be of the same estate as the damaged property, by the doctrine of mutations. However, reimbursement for damages to such intangibles as the wife's business reputation or credit has been held to be community property.<sup>39</sup>

Thus in summary, we see that the statute (Article 4626), while far from completely emancipating the wife from the disabilities of coverture, does at least provide the wife who desires to enter business a means of binding herself on ordinary mercantile obligations. This is highly desirable, for if allowed to assert her defense of coverture, she would be hampered by the natural reluctance of other traders to conduct business with her. It has been strongly argued that, in view of woman's recent increased interest in business, finance, and education, the wife no longer requires the protection afforded her, and that statutes such as Article 4626 are inadequate to meet the wife's practical needs.<sup>40</sup> However, in attempting to give the wife all the legal rights and responsibilities of the husband, the well entrenched, time-honored theories of community property law in Texas are on all sides encountered.<sup>41</sup>

*Patrick B. Gibbons III.*

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<sup>38</sup> *Gleich v. Bongio*, 128 Tex. 606, 99 S. W. (2d) 881 (1937).

<sup>39</sup> *Ainsa v. Moses*, 100 S. W. 791 (Tex. Civ. App. 1907).

<sup>40</sup> *Fitzgerald, This Thing Called Freedom*, 7 DALLAS BAR SPEAKS 23 (1942); Comment, 25 TEX L. REV. 657 (1947).

<sup>41</sup> 33rd Leg., Reg. Sess., 1913, TEXAS HOUSE JOURNAL 1317, a letter to the legislature from Gov. Colquitt. An excellent discussion of Texas public policy as regards the community property doctrine.